



The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's disability, if any?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant, Nancy Kay Thomas, has suffered a six percent (6%) permanent partial general disability to the body as a whole on a functional basis as a result of personal injury by accident arising out of and in the course of her employment with the respondent on August 14, 1989.

The claimant, a long-term employee of the respondent, caught her left heel on an electrical cord while performing her duties with the respondent and fell to the ground on the date of injury. Claimant suffered a severe injury to her right ankle, and less severe injuries to her left hip and left shoulder. Claimant was transported by ambulance to Wesley Medical Hospital and ultimately underwent surgery to the right ankle by Dr. Charles V. Pence, a board certified orthopedic surgeon, in Wichita, Kansas.

On April 8, 1991, while going to a doctor's appointment at Central Medical, claimant suffered a sudden onset of pain when her right foot popped as she was walking up a wheelchair ramp. Claimant was referred back to Dr. Pence and ultimately was referred to Dr. Forney Fleming for ongoing medical treatment. During the pendency of her medical treatment claimant was examined and treated by several doctors. During this time she began experiencing pain in her left lower extremity.

Dr. Fleming, who had the opportunity to treat claimant for an extended period of time, examined and treated only the lower right extremity. He never examined the claimant's left lower extremity, shoulder or hips. He was never advised of any problems associated with the claimant's shoulder and hips. Dr. Fleming returned claimant to work limiting her to four hours standing and walking per day in an eight-hour day. He also prescribed heel pads for both of her feet.

Claimant was examined by Dr. Robert Daniels, a general practitioner, who has worked for Boeing for 13 years. Dr. Daniels examined and treated claimant for pain to her right and left ankles and feet and also examined and treated the right knee and bilateral hips.

He diagnosed the claimant's bilateral lower extremity complaints as being related to the fall and to a varus condition, i.e., turning in of the feet. Varus is also known as flat feet. Dr. Daniels felt that flat feet can be aggravated by many things including one's occupation. He opined that if someone was limping, i.e., favoring one leg over the other, this could put an extra load on the good foot, causing problems to develop. This provided medical support for claimant's contention that her left lower extremity problems developed as a result of overcompensation due to the problems associated with her right ankle. Dr. Daniels provided no impairment rating to the claimant.

Dr. Edward S. Lee, an employee at Boeing Medical Central for over 15 years

examined and treated claimant for several months. The initial treatment shortly after her injury was to her right ankle. As claimant developed problems with her opposite foot, i.e., the left lower extremity, Dr. Lee opined that these problems developed due to overuse of the left lower extremity resulting from the reduced use of the right lower extremity. This would cause claimant to put more weight on her left side. Dr. Lee returned the claimant to work restricting her from prolonged walking and advised she avoid climbing ladders. He also suggested weight loss as claimant had gained approximately 40 pounds subsequent to her injury. Dr. Lee provided no functional impairment rating to the claimant.

Dr. Pence, who performed surgery on claimant's right ankle, opined that claimant had suffered a four percent (4%) permanent partial impairment to the right lower extremity on a functional basis. Dr. Pence did not include claimant's left lower extremity or foot problems in his impairment rating as he did not believe the pronated or flat foot problems were related to the claimant's ankle injury. Dr. Pence did agree that it was possible that a person favoring one leg, along with the additional weight gain might put stress on her left pronated foot. Heavy people with pronated feet often develop pain and potential degenerative arthritic conditions.

Claimant was examined by Dr. Ernest R. Schlachter on July 12, 1991. Dr. Schlachter was informed of claimant's original injury as well as the second injury of April 8, 1991. Dr. Schlachter did not feel the April 8, 1991, injury added to the claimant's permanent condition, seeing it as a temporary aggravation only.

Dr. Schlachter diagnosed bilateral lower extremity problems and opined the injury to the right ankle, which caused claimant to walk with a limp, placed additional stress on the left lower extremity causing the problems to the left side. He saw a definite causal relationship between the left ankle problems and the injury to the right ankle in August, 1989. Dr. Schlachter rated claimant at ten percent (10%) to the right lower extremity which computes to four percent (4%) to the body as a whole, five percent (5%) to the left lower extremity which computes to two percent (2%) to the body as a whole and combined the two equaling a six percent (6%) permanent partial impairment to the body as a whole on a functional basis. He restricted claimant to limited walking, kneeling, squatting and standing. Dr. Schlachter found no evidence of any impairment to the claimant's shoulders, hips, back or buttocks, and felt the evidence supporting an impairment rating to these areas of the body was extremely subjective.

The claimant was examined by two vocational rehabilitation specialists. Jim Molski, a referral by her attorney on July 31, 1991, found that claimant, who had returned to work for the respondent at a comparable wage, had no loss of wage earning capacity. He did feel that, based upon Dr. Schlachter's restrictions, claimant had suffered a seventy to seventy-five percent (70-75%) loss of access to the open labor market, and based upon Dr. Fleming's restrictions had suffered a sixty-five to seventy percent (65-70%) loss of access to the open labor market.

Claimant was referred by the respondent to Stephen L. Sturdevant, Ph.D., a vocational rehabilitation specialist working for Professional Rehab Management. Dr. Sturdevant also found that the claimant had suffered no loss of ability to earn a comparable wage as she had been returned to work for the respondent at a wage comparable to that which she was earning at the time of the original injury. Based upon Dr. Pence's restrictions Dr. Sturdevant found claimant had suffered a fifteen to twenty percent (15-20%) loss of access to the open labor market; based upon Dr. Fleming's restrictions she had suffered a fifteen to twenty percent (15-20%) loss of access to the

open labor market; and based upon the restrictions placed upon the claimant by Dr. Schlachter, a seventeen to twenty-five percent (17-25%) loss of access to the open labor market.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own decision. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

K.S.A. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

K.S.A. 44-510e(a) goes on to say:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

At oral argument before the Appeals Board, claimant's attorney argued that claimant is entitled to a work disability and that the presumption of no work disability in K.S.A. 1992 Supp. 44-510e(a) has been overcome due to the fact that the claimant has been laid off from her employment with the respondent. A review of the stipulations concerning the medical records filed by the parties in this matter, including the records of Dr. James Gluck and Dr. Steven J. Howell shows little information regarding the claimant's continued employment or absence of employment. The one document entitled "Extension of Medical Leave of Absence" dated August 24, 1992, which does speak to this issue indicates that the claimant's leave of absence is temporary only with a potential return to work within approximately two months. This document is not sufficient to overcome the presumption contained in K.S.A. 1992 Supp. 44-510e(a). The Appeals Board finds that there is insufficient evidence in the record to grant claimant a work disability in this matter.

In this instance the claimant was returned to work for the respondent within the restrictions placed upon her by Dr. Schlachter, Dr. Pence, and Dr. Fleming. The Appeals Board finds that based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such claimant is limited to a functional impairment.

Several doctors had the opportunity to examine and treat the claimant. Dr. Fleming rated only claimant's lower extremity having been denied the opportunity to examine and rate the other areas of the body for which claimant had complaints. Dr. Pence rated only the right lower extremity, opining that the left lower extremity complaints suffered by claimant were not related to the original August 14, 1989, injury. Only Dr. Ernest R. Schlachter had the opportunity to examine claimant for all of the injuries alleged to have resulted from this original accident. Dr. Schlachter found claimant to have suffered functional impairments in both her right and left lower extremities, but could find no justification for assessing any impairment to the claimant's hips, back, buttocks or shoulders. The Appeals Board finds that Dr. Schlachter's opinion, takes into account all of claimant's complaints and is the most credible when considering the complete picture of claimant's injuries and ongoing symptomatology and adopts Dr. Schlachter's opinion regarding claimant's impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that Award of Special Administrative Law Judge William F. Morrissey dated January 6, 1994, be modified in that the claimant, Nancy Kay Thomas, is hereby awarded compensation against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty and Surety Company, for 26 weeks of temporary total disability compensation at the rate of \$271.00 per week in the sum of \$7,046.00 and 389 weeks of compensation at the rate of \$23.76 per week totalling \$9,242.64 for a six percent (6%) permanent partial general disability to the body as a whole on a functional basis, for a total award of \$16,288.64.

As of May 16, 1994, there would be due and owing to the claimant 26 weeks of temporary total disability compensation at the rate of \$271.00 per week in the sum of \$7,046.00, followed thereafter by 248.14 weeks of permanent partial general body disability at the rate of \$23.76 per week totalling \$5,895.81 followed thereafter by 140.86 weeks permanent partial general body disability at the rate of \$23.76 per week totalling \$3,346.83 until fully paid or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed fifty percent (50%) against the respondent with and fifty percent (50%) against the Kansas Workers Compensation Fund to be paid as follows:

WILLIAM F. MORRISSEY  
Special Administrative Law Judge

\$ 150.00

DEPOSITION SERVICES

Transcript of Regular Hearing	\$ 216.00
Deposition of Forney Fleming, M.D.	Unknown
Deposition of Charles Pence, M.D.	\$ 299.20
TOTAL	\$ 515.20

DON K. SMITH & ASSOCIATES	
Deposition of Ernest R. Schlachter, M.D.	\$ 244.75
Deposition of Jim Molski	\$ 557.50
Deposition of Edward Lee, M.D.	\$ 382.50
Deposition of Nancy Thomas	\$ 427.50
Deposition of Robert Daniels, M.D.	\$ 303.25
TOTAL	\$1915.50

HOSTETLER & ASSOCIATES, INC.	
Deposition of Stephen L. Sturdevant, Ph.D.	\$ 621.05

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 1994.

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BOARD MEMBER\_\_\_\_\_  
BOARD MEMBER\_\_\_\_\_  
BOARD MEMBER

cc: Norman I. Cooley, 532 N Market, Wichita, Kansas 67214-3589  
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William F. Morrissey, Administrative Law Judge  
George Gomez, Director